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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,

Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE THE FUND FOR CONSTITUTIONAL GOVERNMENT AND THE GOVERNMENT ACCOUNTABILITY PROJECT, A PROJECT OF THE INSTITUTE FOR POLICY STUDIES

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INTEREST OF AMICI

The Fund for Constitutional Government is a non-profit public charity dedicated, *inter alia*, to fostering constitutional responsibility in the conduct of elected and appointed officials.

The Government Accountability Project (GAP), a project of the Institute for Policy Studies, is a non-profit public interest group formed in 1975 to help restore and

maintain confidence in the federal system by making public officials accountable for their activities. In pursuit of these goals, GAP works to broaden public understanding of the role of the federal employee in preventing government waste and corruption.

GAP has been especially concerned about civil servants whose careers are destroyed for having spoken out against governmental wrongdoing. Through public education, legislative efforts and selective legal action, GAP works to protect the right of all federal employees to initiate constructive criticism without fear of retaliation, and to provide these men and women with vital support. *See, e.g.*, GAP's publication, *A Whistleblower's Guide to the Federal Bureaucracy* (1977).

Amici's efforts on behalf of federal "whistleblowers" are made in implementation of a belief that a professional and dedicated civil service is essential to an effective democracy. Career civil servants are a vital link between our government and the people it serves. They are a bulwark against those who would corrupt our institutions. Amici believe that to preserve not only the integrity and independence of the federal civil service, but also the responsiveness of the federal bureaucracy to the general public, conscientious individuals who wish in good faith to point out illegal or questionable practices must not be forced to choose between their jobs or silence.

STATEMENT OF THE CASE

Bessie B. Givhan–petitioner in this case–is a black public school teacher. For eight years prior to her dismissal, petitioner taught in respondent school district – a district marked by a turbulent history of racial discrimination. *See, e.g., Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (*en banc*), *reversed and remanded sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970), *on remand*, 425 F.2d 1211 (5th Cir. 1970). In 1971, following the recommendation of petitioner's superior, Principal Leach, the school district refused to renew petitioner's contract for the coming year. 555 F.2d 1309, 1312.[1] At that time the school district was in the throes of court ordered desegregation.

Petitioner's competence as a teacher was never in question and had nothing to do with her dismissal. *Id.* Rather, her employers were distressed by petitioner's complaints, made to Principal Leach, her immediate superior, about school practices she believed unlawful and which she felt were harming the children she taught. *Id.* at 1313-15.

Petitioner complained to the principal about the school administration apparently reserving certain administrative positions for white staff, and about black youths being fenced out of the more desirable school jobs given their white peers. *Id.* at 1313. Petitioner feared that black children would be adversely affected by seeing whites and blacks assigned different roles in the "school environment." *Id.* She asked the principal to correct the problem by assignment of blacks to the "white" slots and better integration of the administrative staff. *Id.* The administration responded by firing her. *Id.* at 1313-15.

The court of appeals stated the issue as whether petitioner "had a First Amendment interest *as a citizen* in making complaints to the principal," *id.* at 1316 (emphasis in text). It held she did not. It held that "no one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 1319. The court of appeals seemed to

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[1] The court of appeals' Opinion is reported as Ayres v. Western Line Consolidated School District, 555 F.2d 1309 (5th Cir. 1977).

fear that if petitioner's First Amendment claims were upheld, public employees would be forced to receive an unending barrage of complaints from a dissatisfied citizenry:

> Neither a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school board decision.

555 F.2d at 1319.

Viewing Principal Leach as a "captive audience," *id.* at 1319 n. 16, the court reasoned:

> If we held Givhan's expressions constitutionally protected, we would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions.

Id. at 1319. The court of appeals held, in sum, that because Mrs. Givhan did not seek to "disseminate her views publicly," *id.*, the First Amendment did not protect her from a retaliatory dismissal.

ARGUMENT

A PUBLIC EMPLOYEE'S COMPLAINT TO HER SUPERIORS RESPECTING MATTERS RELATED TO CONDUCT OF THE PUBLIC AGENCY EMPLOYER IS SPEECH PROTECTED BY THE FIRST AMENDMENT

I. The Right to Speak is Protected Within the Employment Context as Well as in the Public Media and in Public Forums

The issue in this case is not, as the court of appeals assumed, whether the First Amendment confers on any citizen the right to force government officials to listen

to private expressions of opinion.[2] The issue here is whether the state may punish its employees, by firing them, for speaking to their superiors about matters arising in the arena of their employment.

Teachers, no less than other public employees, have a First Amendment right to express their views on matters of public importance. This Court has "uniformly rejected," *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the theory that "public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable." *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967), *quoted in Pickering*, 391 U.S. at 568. A state may not impose on public employment a condition that impermissibly burdens free speech. *E.g. Perry v. Sindermann*, 408 U.S. 593 (1972); *cf. Arnett v. Kennedy*, 416 U.S. 134, 162 (1974).

This Court held in *Pickering* that a school teacher's good faith criticisms of the institution he served were presumptively entitled to constitutional protection. Only two years ago, in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commision*, 429 U.S. 167, 175 (1976), Chief Justice Burger, speaking for the Court, reaffirmed (following and citing *Pickering*) that "teachers may not be 'compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school in which they [illegible]" (citations omitted).

Until today the decisions of this Court that protect the right of public employees to disagree wi[illegible] or criti-

[2] Although Principal Leach probably would ha[illegible]d to hear complaints by a group of parents, whom he could not have fired.

cize their employers have involved statements made in a public forum. *E.g. Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) (communication to radio station); *City of Madison Joint School District, supra* (speech at a public meeting); *Perry v. Sindermann, supra* (newspaper ad and legislative testimony). There is nothing in the cases, however, which implies that such statements, made not in a public forum but through channels to the employee's superiors, are not equally entitled to constitutional protection. Indeed, the point seems obvious.

> The term ["expression" protected by the First Amendment] would also include communications made in the regular course of agency business, even a conversation between two employees of the agency on some minor matter pending for agency consideration. In other words, if the communication satisfies the other requirements for classification as 'expression,' the fact that it takes place within the employment relation does not take it out of the category of 'expression.' Any other view would, of course, render the First Amendment inapplicable except as to utterances made outside the course of agency business. But there is no reason to draw the line at such a point. Effective functioning of a system of freedom of expression requires, certainly so far as the government employee is concerned, protection made for statements made within the employment relation as well as outside it.

T. Emerson, *The System of Freedom of Expression* 566 (1970); *see id.* at 570-71.

Thus in *Pickering* the Court emphasized not the forum, but the character of the employee's statements as reflecting a good faith "difference of opinion that clearly con-

cern[ed] an issue of general public interest." 391 U.S. at 571. The Court emphasized that the "core value of the Free Speech Clause of the First Amendment" is the right to engage in "free and unhindered debate on matters of public importance." *Id.* at 573. That the "debate" takes place before an audience of one in no way lessens its public importance or its character as protected speech especially where, as here, the statements charged racial discrimination in practices and policies of the school system that directly affect the public. This case squarely raises the issue foreshadowed by the Court in *Madison*—that "[i]t would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate [their] views to the very decisionmaking body charged by law with making the choices raised . . . ." 429 U.S. at 176 n. 10; for the court of appeals held here that a teacher can be punished, by loss of her job, for doing precisely that.

II. The Court of Appeals' Decision Ignores Not Only the First Amendment Rights of the Employee But the Clear Best Interests of the Public Agency Employer and of the Public It Serves

First Amendment protection for in-channels employee complaints is compelled by the uniquely vulnerable status of the civil servant as "whistleblower." "The threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. When a public employee criticizes his agency he is criticizing his employer. Either expressly or by inevitable implication he is criticizing his own superiors. Of necessity he visits discomfort upon them, *cf. Waters v. Peterson*, 495 F.2d 91, 98 (D.C. Cir. 1973). He thus may logically fear dismissal, demotion, transfer or suspension in retaliation for his speech—unless this Court recognizes First Amendment

protection for speech within the employment relationship, as well as for going public.

The court of appeals seems to say that had Mrs. Givhan chosen to air her concerns in a newspaper advertisement, over the radio, or at a public meeting, her conduct would have been protected from dismissal or other retaliation. 555 F.2d at 1318. The court of appeals' theory leaves public employees, who wish to preserve both their jobs and their right to voice concerns about the agencies they serve, no choice but to avoid the internal chain of command and to resort forthwith to the press or the public forum. The anomalous result will be that loyal employees like petitioner will be unable to spare their institutions the public embarrassment that might otherwise have been avoided by working within the system.

The court of appeals thus turns on its head the usual, and usually thought proper, order of complaint presentation. Surely it is better to assure First Amendment protection for public employees' resort to internal channels for complaints or suggestions about public agency policy or practice, rather than to force employees to resort first to a public forum in order to ensure such protection.

Congress has observed that "[a]gency heads who are not aware of potentially serious situations within their own organization obviously cannot take any measure to correct them. . . . [D]isclosures [by whistleblowers] should be made in a manner which ensures that those in affected policy-making positions are held accountable . . . . The first step . . . should be to bring the problem to the attention of those officials most able to resolve it—the policy-makers within the agency. . . . It would be grossly unfair to require that employees take evidence of wrongdoing directly to agency heads without offering protection." As the Congress summed up,

"[s]afe, effective intra-agency communication is the prerequisite of responsible, efficient public service. Dissenting opinions and important information, however unpleasant, must be transmitted to top agency officials." Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers, A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption* at 3, 10, 11, 48 (Comm. Print 1978) (quoted at length in the appendix to this brief).[3]

Agency heads and their top assistants are often far removed from day-to-day operational problems. They may be oblivious to corruption and favoritism at lower levels. The only way for supervisors to obtain the information necessary to maintain efficiency and root out wrongdoing is to rely on and encourage disclosure by employees who have first hand knowledge of the situation.

Lower courts have recognized the need for protection for such communications.[4] In *Burkett v. United States,*

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[3]Protection for such communications is similar to the protection given communications to a public official whose duties involve the subject matter of the communication. Bridges v. California, 314 U.S. 252, 277-78 (1941). It is important to note that this case does not involve a *requirement* that teachers "submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public." *Pickering,* 391 U.S. at 572 n. 4, and *see id.* at 583 n. 1 (concurring and dissenting opinion of Mr. Justice White). Ironically, if there were such a requirement here, petitioner complied with it; for she presented her complaint to her superior and not to the public at all. *See also* T. Emerson, *The System of Freedom of Expression* 574-75.

[4]Congress has from time to time enacted express "whistleblower" protection. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1970), protects employees who protest conditions which "modern labor-management treats as too bad to have

[footnote continued]

402 F.2d 1002, 1008 (Ct. Cl. 1968), the Court of Claims noted "the importance of keeping open the channels through which employees can call alleged derelictions or injustices to the attention of their superiors." In *Swaaley v. United States*, 376 F.2d 857, 863 (Ct. Cl. 1967), the Court of Claims held that a federal employee who had drafted a petition to "one above him in the executive bureaucracy," alleging what he in good faith thought was incompetence and wrongdoing on the part of others, was protected by the First Amendment. In *Johnson v. Butler*, 433 F. Supp. 531, 535 (W.D. Va. 1977), the court held "that the right of a teacher to voice concerns about conditions which interfere with the education of her students falls squarely within the protections afforded by the Constitution." And in *Hostrop v. Board of Jr. College District No. 515*, 471 F.2d 488, 493 (7th Cir. 1972), a state college president was discharged after he prepared a memo-

to be tolerated in a humane and civilized society," from firing for highlighting the problem by walking off the job. NLRB v. Washington Aluminum Co., 370 U.S. 9, 18 (1962). Protection for industrial employees who report violations is also provided in the Water Pollution Prevention and Control Act, 33 U.S.C. § 1367 (Supp. V 1975) and the Toxic Substances Control Act, 15 U.S.C. § 2622 (1976). *See also* S. 2707, 95th Cong., 2d Sess. (1978) and S. 2640, 95th Cong., 2d Sess., § 1206(c)(1978) (protecting federal employees against "reprisal for the disclosure . . . of information concerning a violation of any law, rule or regulation. . . ."); and *see* statement of Chairman Campbell of the Civil Service Commission to the Congress in support of civil service reform legislation:

> The protection of whistle-blowers is, in our judgment, essential to the improvement of the public service. Too often in the past such employees have experienced reprisals in the form of transfers to remote locations, demotions, removal of duties and responsibilities, or discharges from the agency. These employees have found agency grievance procedures unavailable or unsatisfactory in protecting their rights.

Hearings before the Committee on Post Office and Civil Service Reform on H.R. 11280, The Civil Service Reform Act of 1978, 95th Cong., 2d Sess. (1978) (not yet published) statement of Alan K. Campbell, March 14, 1978, at 15.

randum which suggested curriculum changes that the Board of Trustees found offensive. In holding that appellant's complaint stated a cause of action under the First and Fourteenth Amendments, the court noted that "[p]laintiff, as a public employee, is entitled to be protected from retaliation for actions which he had every reason to believe were a part of his assigned duties."

Indeed, as lower courts have on occasion recognized, the public employee may have a duty to disclose. The Court of Claims noted in *Swaaley*, 376 F.2d at 865, that "[i]f Swaaley believed it [a statement he heard that implied official corruption] to be true, he not only might have reported it, but was under a duty to do so." The court said in *Downs v. Conway School District*, 328 F. Supp. 338, 348 (D. Ark. 1971), that a public school teacher's failure to complain about safety hazards in school "would be violative of her moral, if not legal duty to protect the health and safety of her students."

The public employee's right and duty to blow the whistle is the same "right and duty" every citizen has to "communicate to the executive officers any information which he has of the commission of an offense against [the criminal] laws." *In re Quarles*, 158 U.S. 532, 535 (1895). The reciprocal duty of the government to protect the informing citizen against retaliation arises not " 'solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, ...' " *Id.* at 536, *quoting Ex parte Yarbrough*, 110 U.S. 651, 662 (1884). *See also Edwards v. Habib*, 397 F.2d 687, 690 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (reporting violations of law "is at the core of protected First Amendment speech").

The whistleblower's duty is the duty Congress recognized twenty years ago in the Code of Ethics for Government Service, H.R. Con. Res. 175, 72 Stat. B12 (1958):

> Any Person In Government Service Should:
>
> Put loyalty to the highest moral principles and to country above loyalty to persons, parties or Government department.
>
> UPHOLD The Constitution, laws, and legal regulations of the United States and all governments therein and never be a party to their evasion.
>
> * * *
>
> SEEK to find and employ more efficient and economical ways of getting tasks accomplished.
>
> * * *
>
> EXPOSE corruption wherever discovered.
>
> UPHOLD these principles, ever conscious that public office is a public trust.

CONCLUSION

Here petitioner's loyalty to principle—the constitutional principle of racial equality—as expressed to her own superiors, was rewarded with dismissal. Her conduct of her office as a public trust, her right to voice her concerns about evasion of the Constitution and, indeed, of

the commands of this Court, are protected by the First Amendment. The decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX TO BRIEF OF AMICI CURIAE

Excerpts from Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers, A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption* (Comm. Print 1978) (footnotes omitted) (emphases in text).

p. iii— The efforts of whistleblowers ultimately redound to the benefit of the administrative agencies and the public. Unfortunately, the reward for a whistleblower's adherence to the highest moral principles is often harassment by the employee's supervisors.

p. v— Many employees who discover governmental abuse in the course of their work do not believe that the problems can be answered by turning their backs. However, the personal risks incurred by a "whistleblower" make it hazardous to speak out.

p. 1— *Employees who have exposed governmental waste and abuse have been fired, transferred, reprimanded, denied promotions, RIFFED, or harassed through the misuse of formal discipline procedures.*

Regardless of the validity of the initial allegations raised, many employees who are identified as whistleblowers have been subjected to formal discipline measures as a consequence of their actions.

The treatment received by most whistleblowers serves not only as a reprisal against a "boat-rocker," but also as a warning to other federal employees not to disclose problems, for they can expect similar treatment if they do.

p. 2— *The lack of effective and safe internal agency procedures for registering and resolving allegations*

of wrongdoing is responsible for the initiation of most whistleblower cases.

The federal employee who discovers something wrong often finds himself without an interested or authorized forum to review the problem. Midlevel supervisors often impede the flow of information to top officials because the allegations, even if the supervisor is not directly involved, reflect poorly on his office or division. Most existing internal communication systems are ineffective because the employees who use them are not adequately protected from reprisals and because the system does not ensure that the initial allegation will be confronted and resolved by agency heads.

Whistleblowing is a question of accountability. Those people in policy-making positions should be made aware of and held accountable for the resolution of all allegations of governmental waste and abuse.

Whistleblowers are not asking that agency heads be relieved of their authority and that all employees participate in all decisions. The issue here is one of communication and accountability.

p. 3– Agency heads who are not aware of potentially serious situations within their own organization obviously cannot take any measures to correct them. However, once informed of a problem, once provided with the existing facts pertaining to an allegation of wrongdoing, the agency head can decide what the appropriate response should be. He or she can, using existing authority, make decisions, resolve the problem and be held accountable for their actions.

It is currently too easy for a serious problem to be excused within the bureaucracy because the "right" people were not aware that it existed.

An employee who calls attention to waste or abuse initiates a sequence of events that often becomes uncontrollable. The problem originally raised by the employee very quickly becomes secondary or even irrelevant as the bureaucracy decides how to handle the person who created the disturbance–the whistleblower.

The bureaucracy's major response to a whistleblower is to ignore the allegations raised and to direct its attention at the employee. Once the focus of attention has been centered on the employee, the bureaucracy possesses everything necessary to deal with the "employee problem."

Most whistleblowers are harassed. The harassment itself, or the employee's effort to combat the harassment, triggers a grievance procedure which usually results in neutralizing the whistleblower by forcing him to concentrate his effort and resources on his own defense. The cost, both in financial and human terms, is staggering.

p. 7– The lack of effective internal agency procedure for registering suggestions and concerns is responsible for the initiation of most whistleblower cases. There is no standard procedure for the transmission of ideas to policy makers from policy implementors. Midlevel supervisors often thwart the employee's efforts to communicate controversial, however truthful, information. The supervisor wishes to avoid department-level scrutiny, since problems in his division reflect poorly on his own performance. As an employee becomes increasingly frustrated, he may go too far in attempting to air his concerns. He crosses this line by going too high in the Department or by turning to the "outside."

p. 8– The problems most frequently encountered in whistleblower cases suggest two major areas that should be addressed by reform. There must be increased internal agency communication and more effectively enforced protection from arbitrary harassment. Hopefully, progress in these directions will lead to a positive change in the attitude of federal employees.

pp. 10-11– The following definition of the whistleblowing duty was developed on the basis of this premise as well as from cases and writings on the subject.

> It is the duty of all federal employees to make known examples of governmental waste, misfeasance, or malfeasance to which they have been exposed during the course of their employment. These disclosures should be made in a manner which ensures that those in affected policy-making positions are held accountable for determining the nature of the problem and bringing about its resolution. Federal employees have the right to fulfill this duty free from harassment or reprisal of any type from their superiors, agency, or the Federal Government.

The responsibility of a federal employee to work toward the elimination of governmental malfeasance, misfeasance, and inefficiency should not be a discretionary one. Every federal employee should be charged with keeping the public's best interest foremost in his or her mind. Efficient public service demands that those involved in policy implementation operate under the duty to point out instances where the Government failed to adequately perform its function. As the Federal Government grows larger and more complex, the opportunities for inefficiency, corruption, mismanagement, abuse of power, and other inappropriate activities become more frequent. When these opportunities are exploited, the public finds itself spending more money for less service. The people in top policy making positions are often too far removed from the programs to be able to spot such cases. The people in the best position to bring examples of these activities to policy makers are the federal employees involved in program implementation. They should be encouraged to fulfill this duty.

The first step in a federal employee's attempt to eliminate governmental waste, misfeasance or malfeasance, should be to bring the problem to the attention of those officials most able to resolve it—the policy-makers within the agency. Agency heads who are made aware of a problem can be held accountable for its resolution. Administrators may choose to ignore an employee's allegations, but they risk the ensuing consequences.

When confronted with allegations of waste, misfeasance, or malfeasance, agency officials should be responsible for actively inquiring to see if, in fact, a problem exists and then deciding on corrective action. Their motivation can come from either the severity of the problem presented, or from the desire to avoid any personal or agency embarrassment should the issue be investigated by another body; the public interest is served either way.

Placing the duty to expose governmental wrongdoing on federal employees presupposes their right to freedom from harassment and reprisal. It would be grossly unfair to require that employees take evidence of agency wrongdoing directly to agency heads without offering protection. Without strict safeguards, no federal employee can reasonably be expected to take such action. In the interests of efficiency and

well-motivated public service, procedural safeguards for whistleblowers must be strictly enforced.

p. 12– The desire to maintain a smooth running operation endangers an employee who does pursue the elimination of waste or inefficiency too aggressively and he is often not rewarded by the agency. In fact, the result of the employee's efforts may ultimately be punishment.

p. 16– The need to provide more effective vertical communication within the executive agencies has been well known for many years. Federal employees responsible for implementing policy have a unique and valuable perspective which should be conveyed to those who formulate policy.

The amount of relevant data and knowledge at a policymaker's disposal is directly proportionate to the effectiveness of communication from the agency's "front line" employees. There can be no question that policymakers with functioning, open lines of communication are better qualified to make decisions.

The internal act of communication itself is a neutral, objective act. It does not imply that the policymaker's authority should be shifted to policy implementors. Furthermore, it does not even suggest that the policy implementor's personal opinion on a policy decision should be considered. Communication merely ensures that all relevant facts are made known to the policymaker. This increased level of knowledge adds to the resources from which to draw in decision making. It also increases the policymaker's accountability for a policy's implementation.

pp. 45-46– An employee's right to petition his or her superior is protected by the First Amendment, even though the petition may contain defamatory

statements of a public official. Such a situation was considered in *Swaaley v. U.S.*, in which an employee's in-house petition contained remarks defaming a superior. The Court, noting that it remained within the Department and was presented through the proper grievance channels, said that ". . . (it) need do no harm."

The "harm" comes to both employee and "defamed" official when the statement is publicly circulated. An Air Force civilian employee was discharged for circulating, without the required clearance, a pamphlet criticizing the use of federal money. The Court, sympathetic to his aims, noted that ". . . he simply sought to call attention . . . to maladministration at the government installation for which he worked. Certainly, employees of the Federal Government are not shut off from discussing the defects of their employer, in proper context and fashion." They continued, however, saying that by publishing the broadside, the ". . . *plaintiff violated the obligation of loyalty each employee owes his employer.* The Federal Government, as employer, is entitled to a like measure of loyalty." (Emphasis added.)

Civil Service employees, particularly whistleblowing employees, have certain duties and responsibilities to their government agency, and to the public at large. It seems unreasonable to protect against disclosures so unfounded or with total disregard for agency grievance procedure. The Federal Civil Service, with an interest in efficient public service, may legitimately require the employee to proceed through proper agency channels before going public. The Supreme Court, in *Arnett v. Kennedy*, said that speech, protected or not, may not be grounds for dismissal except for the efficiency of the service.

The employee, in carrying his or her grievance through the proper agency channels, is pressed with the responsibility to exhaust the administrative remedies in seeking a resolution. Under this doctrine, no employee is entitled to a judicial forum until the prescribed administrative procedures have been completed.

Several difficulties arise in the enforcement of this doctrine. Often the employee is forced to take his or her complaint directly to the superior who is the basis of the complaint itself. If the employee fails to comply with the agency's procedures, he or she may be discharged for insubordination.

The doctrine is subject to numerous exceptions. In cases requiring familiarity with the particular administrative scheme, the courts will often defer to the agency to judge whether the employee fulfilled the procedural requirement. One court justified the requirement by stating that ". . . if he is required to pursue his administrative remedies, the courts might never have to intervene." The agency should be given the opportunity to discover and correct its own errors. The Court was also concerned that ". . . frequent and deliberate flouting of administrative processes could weaken . . ." agency effectiveness by encouraging people to ignore the procedures.

In many cases, at the outset of the hearing process, the employee has been relieved of his or her official duties. The employee has generally retained a lawyer, whether or not the case reaches the courts. While suspended, he has no means of livelihood to support himself and his family or to pay the attorney.

Although 5 U.S.C 5596 stipulates recovery of back pay, rarely if ever have the courts, finding the employee victim of improper administrative action, awarded damages in the form of attorney's fees. Case law concerning attorney's fee awards is rife with disparate judgments from different judicial districts. Generally, the courts have stated that neither they nor the Civil Service Commission have the express authority to award legal fees without such a statutory grant of authority from Congress.

In *Fitzgerald v. U.S. Civil Service Commission,* Fitzgerald contended that statutory authority was granted through the Veteran's Preference Act (VPA), section 14. The VPA provides that World War II veteran preference eligibles are entitled to Civil Service Commission appeal from adverse actions with full procedural rights. The Commission is to submit its findings to the administrative agency. The Act states that the agency shall take the corrective action recommended by the Commission.

The courts, however, have differed in their decisions on veterans' ability to recover. One speculated that legal fees might not be recoverable, while another found recovery only for cases involving procedurally improper separations. A third court stated that veterans were eligible to recover legal fees if they were separated and later reinstated.

In *Fitzgerald,* the court held that attorney's fees were not recoverable under VPA section 14 because the section does not contain the "express waiver of sovereign immunity". The Supreme Court has stated that the United States and its agents are immune to suit unless it consents to be used, which must be unequivocally expressed.

Absent this waiver legal fee awards cannot be granted. The *Fitzgerald* court reluctantly agreed that a denial of legal fees under section 14 ". . . would make a mockery and a sham of the mandate of Congress." The court went further, stating that the waiver of immunity and recovery must come from Congress and not the courts.

p. 48– Whistleblowing could hardly be a major issue if federal employees were able to discharge their duty in accordance with the Code of Ethics for Government Service. All action, Government wide, directed at the resolution of the problem, must encourage federal employees to follow the Code. They can no longer be punished for adherence to the dictates of the Code while acting in compliance with their responsibility of public trust. It can no longer be safer and more career enhancing to turn one's back on illegal and even dangerous abuses in government agencies. Honesty and efficiency must be rewarded within the agencies themselves and not only later by the media's and the public's willingness to portray whistleblowers as martyrs.

Serious efforts to encourage compliance to the Code of Ethics within the bureaucracy demand administrative accountability. Agency policy makers must be made aware of and accountable for those problems that federal employees encounter in the course of their work. Safe, effective intra-agency communication is the prerequisite of responsible, efficient public service. Dissenting opinions and important information, however unpleasant, must be transmitted to top agency officials.

p. 49– Federal employees are currently afraid to bring problems to the attention of their superiors. The existence of this fearful attitude must convince

even the most skeptical that a serious problem does indeed confront this Government. The fear of reprisal is so prevalent throughout the bureaucracy that waste and illegality are too often allowed to go unchecked. The code of silence thwarts top management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Agency heads operate without full knowledge of their own agency's activities. Fear of reprisal renders intra-agency communication a sham, and compromises not only the employee, management, and the Code of Ethics, but also the Constitutional function of congressional oversight itself.

Open Door

The least expensive and most easily implemented method for increasing communication within the executive agencies is the use of the "open door" technique. Under this system, the federal employee is able and encouraged to take concerns, complaints, and suggestions directly to his or her supervisor, branch chief, or agency head. The open door would assist in the speedy resolution of problems by encouraging discussion at all levels of bureaucratic administration. It would also open direct lines of communication between policy makers and policy implementors. The open door, if effectively used, would ensure that policy makers became aware of the practical implications of their decisions.
